

RECORDING HOTEL MANAGEMENT AGREEMENTS – WHY?

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Hotel Management Agreements

Basic Terms

Looking at one of the 2,600 hotels branded with any one of the Marriott brand names (Ritz-Carlton, Marriott, Renaissance, Courtyard, Fairfield, Residence, Towne Place, Spring Hill, Horizons), it would be easy to conclude incorrectly that Marriott International must be a very large landowner. But the large brand owners do not invest their capital if at all possible in real estate, bricks and mortar. The profit potential for recognized hotel brand owners derives from the management of someone else's hotel. True, hotel management companies often own some hotels, usually their flagships in major markets where they were willing to bear the cost of entry into the expensive downtown, or they lease a building, with a portion of the operating revenue going to the landlord as rent, or they own some percentage, typically a minority interest, in a hotel owning company. But the preferred and dominant means of flagging a hotel with a brand is via the hotel management (sometimes called "operating") agreement ("HMA") pursuant to which the hotel company not only brands the hotel, but oversees its operations as well. An alternative to the HMA is a franchise agreement pursuant to which the brand is licensed and certain brand services, such as reservations and group purchasing, are also made available, but the owner retains management control and agrees to comply with brand standards. The obvious advantage of branding rather than owning is, of course, that the hotel company is able to build a chain of branded hotels in many locations and does not have to consume its capital to acquire land, build or renovate a hotel, or make capital improvements to maintain brand standards.

This presentation will deal with HMAs, and, specifically, the recording of HMAs, rather than franchise agreements (which are subject to Federal and state regulations governing franchise offerings).

Typical fees under the HMA are comprised of (a) a percentage of all hotel revenue (2-5% is typical), plus (b) an incentive fee that is a percentage of some measurement of the hotel's profit or cash flow. The first fee rewards volume generation; the second fee rewards operating efficiency. At one extreme, the incentive fee is a percentage of operating profit (i.e., revenues minus operating expenses, but debt service, property taxes, reserves for replacement of furniture, fixtures and equipment and property insurance premiums are not subtracted as operating expenses) and at the other extreme, a percentage of pre-tax net cash flow. In the case of the former, the range of incentive fee

is 8%-12%; in the case of the latter, the percentage will of course be much higher – possibly 25% of net cash flow.

A Service Contract

The HMA is essentially a service contract. The manager will provide day-to-day supervision of operations, hire, train, and fire employees, supply key personnel from its ranks of trained experts, plan marketing and sales activities, prepare budgets, both annual operating budgets and capital expenditure budgets, oversee routine maintenance and capital replacements and improvements, and provide a vast array of corporate services to support the on-site hotel operations. The brand name and reservations systems, volume purchasing and brand identification and advertising programs are all included (usually for additional fees based on measurements that apply uniformly throughout the chain of hotels bearing the same brand).

An Agency Appointment

Under some analyses which have become the subject of so many articles by lawyers practicing in this area, HMAs are agency appointments whereby the owner has appointed the manager to serve as the good steward overseeing the master's lands and rents. Many management companies expressly provide that the manager is the agent of the owner in order to make it clear that all activities of the management company are for the account of the owner. Here are some examples:

“Owner hereby appoints Manager as Owner’s *sole and exclusive agent* to manage and operate the Hotel. Manager will perform the local on-site management and operation functions for the Hotel (also as agent for Owner), accepts such appointment and agrees to manage and operate the Hotel in good faith for the account of Owner in accordance with the terms and conditions set forth in this Agreement. Manager shall have sole discretion and control, free from Owner’s interference, in all matters relating to the management and operation of the Hotel. “

And another major management company’s agreement takes the same position:

“Subject to the provisions of this Contract, Owner hereby engages Operator, and Operator hereby agrees to be engaged and does undertake to supervise, direct, and control the management, operation, and promotion of all aspects of the Hotel *as the agent of Owner* and as the exclusive operator of the Hotel during the Operating Term.”

As does another:

“Agent Status. In the performance of its duties as manager of the Hotel, Manager *shall act solely as agent and for the account of Owner*. Nothing in this Agreement shall constitute or be construed to be or create a partnership or joint venture between Owner and Manager or constitute or create a property interest of Manager in the Hotel.”

Other management companies expressly disclaim the role of agent, but that is no assurance that an agency will not be found to exist if a court is called upon to scrutinize the agreement; merely denying the agency does not assure that an agency will not be found to exist.

The role of agent has brought with it some unintended consequence for the management company. If the HMA is also an agency appointment, then the manager-agent is subject to the high standards as a fiduciary of the owner-principal. In addition, this characterization of the HMA has resulted in the legal holding that a management agreement, notwithstanding the stated term therein, may be terminated at will by the principal/owner who has the power to do so under agency law and the terminated manager may not have specific performance available once the agency (i.e., the HMA) has been terminated. Notwithstanding the termination of the HMA by exercise of the owner's right to do so under agency law, the terminated manager will typically have an action based on contract for damages caused by the early and wrongful termination (This is of little concern where an insolvent owner facing a foreclosure seeks to rid itself of the manager.) A significant limitation on the owner's power to terminate the HMA as an agency is that the agency may not be terminated where it is "coupled with an interest".(1)

Note in the last example set forth above that a clause was added by counsel for the owner (the underlined text) to the effect that the manager, as agent for the owner, does not have any interest in the property of the owner. This was added, and the request to record a memorandum of the HMA found later in the document was deleted, to negate the possibility that the manager has an "agency coupled with an interest" which has been held to eliminate the owner's power to terminate the agency appointment at any time. (2)

It seems somewhat odd in the commercial context where a sophisticated owner has entered into an HMA as a contract with a stated term, sometimes as long as 40 years, that the owner has the power to terminate the HMA at any time by invoking its characterization as an agency appointment. Under recent Maryland legislation, this agency notion and its odd consequences in the commercial context can contractually be eliminated. The relevant section of the Maryland Commercial Law is attached as Exhibit A.

Requests to Record

In many standard forms of the HMA promulgated by the management companies, and even in some of the final negotiated versions, there is a requirement that the owner permit the recordation under the local land recording statutes of either the entire HMA or, more typically, a "Memorandum" thereof. Exhibit B-1 contains a typical covenant to record, and Exhibit B-2 contains a less typical provision wherein recordation is a condition to the effectiveness of the HMA. Exhibit B-3 contains another example.

An Interest in Real Property?

The typical recording statute contemplates the recordation of an instrument whereby, using the New York statute as an example: "... any estate or interest in real

property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected, including an instrument in execution of a power, although the power be one of revocation only, and an instrument postponing or subordinating a mortgage lien; except a will, a lease for a term not exceeding three years, an executory contract for the sale or purchase of lands, and an instrument containing a power to convey real property as the agent or attorney for the owner of such property.” Exhibits C -1 through C-3 respectively contain excerpts from the New York, New Jersey and Florida recording statutes.

What is it about an HMA that makes it, arguably, an instrument that satisfies the requirements of the recording statutes? Does the manager have some interest in the property, perhaps a possessory interest similar to that of a tenant? Does the mere recording of an HMA possibly satisfy the agency concept of “coupled with an interest” which eliminates the owner’s power to terminate the HMA at any time. On this latter point, I could find no authority for the proposition that the recording of the HMA will per se give rise to such an “interest”, but the possibility should be considered.

That HMAs or memoranda of HMAs have been accepted for recording does not close off the question of whether or not they should be recorded; if a Memorandum, acknowledged in the form required for a deed, is presented to a clerk or registrar for recording, it is unlikely that the recording officer will question whether or not the instrument has the substantive content required for recorded instruments.

What aspects of an HMA, at least arguably, satisfy the requirement that they be instruments of conveyance of an interest in real property?

Here are some possibilities derived from common HMA provisions:

The manager is “in possession” (i.e., has exclusive domain and control) of the property to the exclusion of the owner. Some HMAs even use words that connote a leasehold interest, such as the manager’s having the right to “occupy” the hotel, and to do so “free from interference” by the owner. Many HMAs have language that is similar to the non-interference provisions of a lease. For example, one recently executed HMA with a major hotel chain operator states:

“The manager shall have discretion and control, free from interference, interruption, or disturbance, in all matters relating to the management and operation of the hotel.”

The manager has the power to grant interests in the land, for example, pursuant to the HMA provision that allows the manager to grant leases to tenants for commercial space in the hotel, perhaps even long-term leases, albeit with some owner review or approval right.

The HMA restricts the right manager to transfer the property; the manager must approve the transferee. This is a restriction that should run with the land.

The HMA survives the transfer; a purchaser must know this. This is a restriction that should run with the land. (Query: Would a purchaser of the hotel be on actual or at least constructive notice that the manager has an agreement that might survive closing simply by virtue of the manager's obvious presence at the hotel? Would a purchaser buy without reviewing the HMA as part of the purchaser's due diligence? Could a purchaser ever be a bona fide purchaser without notice that the manager has an agreement that may survive a sale of the hotel?)

The HMA grants to the manager a right of first offer or a right of first refusal in respect of any sale of the property. This is a restriction that should run with the land.

The HMA provides that the property must be physically maintained to the standards of the manager.

In the case of a mixed-use resort hotel i.e., with a hotel and residential components, such as condominium units), the HMA provides that there must be covenants, conditions and restrictions ("CC&Rs") that impose certain affirmative and negative covenants, etc. upon the unit residential unit owners. Presumably recording the CC&Rs and not the HMA satisfies this requirement.

The HMA provides that the manager will advance key money (i.e., a cash contribution to help the developer finance the early stages of the project which is sometimes refundable after the project matures), or operating cash, or make a subordinate loan, all of which become indebtedness of the owner to be secured by a mortgage on the property (albeit a subordinated mortgage, subordinate to the senior lender's mortgage). Again, presumably a recorded mortgage rather than a recorded HMA is the best way to satisfy this requirement.

The HMA provides a priority of payments (a "waterfall") that dictates where in the distribution of cash flow the senior lender, the manager and the owner participate in the distribution. Once again, the senior loan and the manager's subordinated loan should provide for mortgages that will dictate the order of priority to the property as security for any payments that are due them. The waterfall in the HMA by itself does not have any "property" aspects.

The HMA may provide that the owner must obtain a Subordination and Non-Disturbance Agreement ("SNDA") from the senior lender whereby in the event of a foreclosure the senior lender manager will recognize ("attorn to") the senior lender as the new owner, and the senior lender will honor the HMA (not disturb the manager). Presumably, these matters are best dealt with in the SNDA and an inter-creditor agreement, and do not change the nature of the HMA to an interest in real property.

The HMA will in many instances provide for credit enhancements from the manager to the owner in favor of the senior lender. This is especially true where the project is desirable from the manager's perspective and the manager is willing to "have some skin in the game" as the price it will pay to obtain the right to manage and flag the property. These may include key money (refundable in whole or in part if the term of the HMA is cut short before an agreed period), a performance test whereby the owner may

terminate the manager if certain performance tests are not met (such as matching the revenue per available room to that of an agreed competitive set), or a guaranty of the debt service on the senior loan, or a subordinated loan, or fee standasides if debt service cannot be met, and many other possibilities to enhance the project's appeal to a senior lender and equity investors. Each of these concessions from the manager may be promised in the HMA, but some of them will require separate documentation, such as the subordinated loan, which can be recorded if appropriate.

Exhibit D contains an example of a recorded restriction that was used in a non-U.S. project which recites that manager has an interest in the land by virtue of the benefits to manager under a Non-Disturbance Agreement referred to therein (see Paragraph 1 of Exhibit D) and because manager has a right of first refusal in the event of a sale of the hotel (see Paragraph 2 of Exhibit D). Note the somewhat unsatisfactory procedures (from the owner's perspective) set out in Paragraph 6 to eliminate the recorded Restriction if the HMA is terminated. Ultimately, the owner may have to seek a court order.

If the hotel is part of a mixed-use project, and the owners of the non-hotel component, such as an adjoining office building or residential building, are relying upon the adherence by the owner of the hotel component to certain standards of operation for the hotel in order to preserve the quality cache of the entire project, then it may be appropriate to record the HMA, or at least portions of the HMA that deal with operating standards, as part of a reciprocal easement for the project. An example of an "Easement and Operating Agreement" prepared for recording for this purpose, which contains the HMA within it, can be found at:

www.abanet.org/rppt/cmtes/standing-committees/community/Yi5.pdf

This form was included in a presentation that was part of a CLE program sponsored by the ABA Section on Real Property, Probate and Trust Law at the ABA Annual Meeting in Atlanta in 1991. (3)

Why Resist?

Why should a hotel owner resist recording the HMA or a memorandum thereof?

The HMA is merely, in most cases, just a service agreement, and the service provider (the manager) has no basis to seek to encumber the owner's most valuable asset – the real estate that comprises the hotel. In effect, the manager has a lien for to secure the owner's performance under the HMA, without providing the owner with a comparable assurance or security for the manager's performance.

Possibly, the recordation creates or at least acknowledges the creation or existence of an interest in the land. Query: Is this an interest that, coupled with the agency, has the effect of eliminating the owner-principal's right to terminate? I do not know whether or not this issue has been tested in court.

If the HMA takes on the attributes of a lease, the owner may unintentionally have subjected itself to the landlord-tenant statutory regime and have to resort to a judicial eviction rather than a mere contract termination

If the owner terminates the HMA, either as of right pursuant to an early termination right or due to the manager's default, and if that termination is contested, a recorded HMA clouds title and a court order may be required to extinguish the HMA from the land record.

The senior lender will want to be sure that the recorded HMA does not render its senior mortgage in any respect inferior to the HMA.

The lack of case law on the subject suggests that the owner is entering into the realm of legal uncertainty by allowing the HMA to be recorded.

Conclusion.

The recording of the HMA seems to be an overreach by the manager. The recordation of such an agreement is not contemplated in typical recording statutes and the consequences of the recordation are not certain. To the extent that the manager has a legitimate claim to encumber the real property of the owner, this can be accomplished with greater certainty by an instrument that is designed to address the specific right of the manager for which the world of potential purchasers must be put on notice and for which security in the form of a lien on the owner's real property is appropriate, such as a second mortgage to secure the manager's subordinated loan, if any. As a general rule, the owner should just say "no" and should include in the HMA a provision that prohibits the manager from recording the HMA.

EXHIBIT A

Maryland Commercial Law

Section 23-102. Conflicts between terms and conditions; remedies for breach.

- (a) Conflicts between operating agreement and the law.- If a conflict exists between the express terms and conditions of an operating agreement and the terms and conditions implied by the law governing the relationship between a principal and agent, the express terms and conditions of the operating agreement shall govern.
- (b) Remedies for breach.- A court may order the remedy of specific performance for anticipatory or actual breach or attempted or actual termination of an operating agreement notwithstanding the existence of an agency relationship between the parties to the operating agreement.

EXHIBIT B-1

Section 14.24. Memorandum. To the extent permissible under the laws of the _____, the parties intend that the terms and conditions of this Agreement shall run with the real property comprising the Premises and Owner's interests therein and shall be binding upon all successors to such interests. To effectuate such intention, Owner and Operator shall execute and record or register in the relevant land records a license referencing this Agreement and a Caution/Restriction referencing this Agreement and any Non-Disturbance Agreement, in the forms attached hereto as Exhibit A, and with such modifications or additional documentation as may be reasonably required by the Registrar of Lands in order to cause registration by the land registry, provided that neither Operator nor Owner will register or record the Agreement itself on the land records without the consent of the other party). Operator agrees to execute any documentation as necessary to release any such Caution or Restriction upon termination of this Agreement to the extent such release is not automatic, and to give its consent to any registration in connection with a transfer of the Hotel that is in accordance with this Agreement. Upon termination, should Operator fail to execute such documentation, Owner may cause such Caution or Restriction to be released through the certification process as contemplated in the form of Restriction contained in Exhibit A hereto (subject to Operator's rights as also contained therein) or through other means available under _____ laws, including through _____ courts. No such certifications or court proceedings shall affect or in any way prejudice either party's rights under the Operating Agreement.

EXHIBIT ---

MEMORANDUM OF OPERATING AGREEMENT

THIS MEMORANDUM OF OPERATING AGREEMENT is made and entered into as of this ____ day of _____ 200__ by and between _____, a _____ organized and existing under the laws of _____, with its [registered office] / [principal place of business] at _____ (herein called "Owner"), and _____ a _____ organized and existing under the laws of _____, with its registered office _____ (herein called "Operator").

WITNESSETH:

Owner and Operator have entered into that certain Operating Agreement dated of even date herewith (herein the "Operating Agreement") with respect to the operation of a luxury hotel on the premises located in _____, as more particularly described on Annex A attached hereto (the "Premises").

The Operating Agreement is for a term (the "Operating Term") commencing on the Commencement Date (as defined in the Operating Agreement) and shall continue thereafter through December 31 of the calendar year that is twenty (20) full calendar years after the Commencement Date, subject to extension or early termination as set forth therein. Upon the expiration of the initial Operating Term, the Operating Term shall be extended for an additional period of twenty (20) full calendar years unless not less than two hundred forty (240) days prior to the expiration of the initial Operating Term Operator has given written notice to Owner of its election not to extend.

Except as expressly provided in the Operating Agreement, Owner shall not consummate any Ownership Transfer (as that term is defined in the Operating Agreement) without giving at least sixty (60) days prior written notice thereof to Operator stating the name and full identity of the proposed transferee(s), including the names and addresses of all owners of stock, beneficial interests or other proprietary interests therein and all essential terms and conditions of the proposed transfer, together with all other information with respect thereto which is reasonably requested by Operator and reasonably available to Owner. For a period of sixty (60) days after Operator's receipt of such notice from Owner, Operator shall have the right to elect to consummate such Ownership Transfer with Owner on the terms and conditions contained in Owner's notice, such right to be exercised by giving written notice to Owner within such sixty (60) day period. The giving of such notice by Operator shall create a binding executory contract between Owner and Operator on such terms and conditions, except that all time limits for performance by Operator thereunder shall be extended as provided in the Operating Agreement. If Operator fails to so elect within such period, Owner shall be free to consummate such Ownership Transfer so long as no material change is made in the terms and conditions thereof; provided, however, that no such Ownership Transfer shall be valid unless the transferee agrees to be bound by all the terms and conditions of the Operating Agreement and, to the extent such transferee succeeds to all or part of Owner's rights or obligations under the Operating Agreement, agrees to assume and perform Owner's obligations under the Operating Agreement, in a writing in form and substance reasonably satisfactory to Operator.

IN WITNESS WHEREOF, Owner and Operator have caused this Memorandum to be executed under seal by their duly authorized representatives as of the day, month and year first above written, for the purpose of providing an instrument for recording and giving notice of the Operating Agreement.

OPERATOR:

OWNER:

_____,
a _____ company

_____,
a _____ company

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

EXHIBIT B-2

CONDITIONS PRECEDENT:

The registration of a memorandum of this Agreement or other recordable document in favor of Operator in the form indicated in Exhibit A, such document to be registered in a rank with priority to all other rights (including every Mortgage) to be registered in the real estate register; or

EXHIBIT B-3

15.08 Recordation

If and to the extent at any time permissible under the laws applicable to the Site, the terms and provisions of this Agreement shall run with the land designated as the Site, and with Owner's interest therein, and shall be binding upon all successors to such interest. If and to the extent at any time permissible under the laws applicable to the Site, at the request of any party, the parties shall execute an appropriate memorandum of this Agreement in recordable form and cause the same to be recorded or registered (or take whatever other steps are necessary to give official notice to all third parties that this Agreement binds the Site) in the jurisdiction where the Hotel is located or as otherwise necessary to give effective official notice. Any cost of such recordation shall be initially borne by Owner and then reimbursed to Owner as a Deduction.

EXHIBIT C-1

New York Real Property Law

Section 290. Definitions; effect of article.

1. The term "real property, as used in this article, includes lands, tenements and hereditaments and chattels real, except a lease for a term not exceeding three years.

2. The term "purchaser" includes every person to whom any estate or interest in real property is conveyed for a valuable consideration, and every assignee of a mortgage, lease or other conditional estate.

3. The term "conveyance" includes every written instrument, by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected, including an instrument in execution of a power, although the power be one of revocation only, and an instrument postponing or subordinating a mortgage lien; except a will, a lease for a term not exceeding three years, an executory contract for the sale or purchase of lands, and an instrument containing a power to convey real property as the agent or attorney for the owner of such property.

New York Real Property Law

Section 378. What owners may apply; what titles may be registered.

Petition for registration of title may be made by the following persons:

First. The person or persons who claim, singly or collectively, to own in fee simple the legal estate in land, or in some right in or overland, and who hold and possess such land or such right.

Second. The person or persons who claim, singly or collectively, to own a contract for the purchase in fee simple of the legal estate in land, or in some right in or over land, from the owner thereof. Registration in the name of the holder of the contract shall not be made, except on the production of a proper transfer of title under and pursuant to the contract from a transferor in possession, or the consent in writing, duly acknowledged, of the proposed vendor in possession and named in the contract and his wife, if he be married. Such transfer or consent may be made after the commencement of the registration proceeding.

Third. The person or persons who claim singly or collectively, to have the power of appointing or disposing in fee simple of the legal estate in land, or in some right in or over land.

No title to a mortgage, lien, trust, charge or estate less than a fee simple shall be registered, unless the title to the legal estate in fee simple in the same property is first registered.

When the petition is made by the holder of a contract to purchase, it shall refer to the ownership of the proposed vendor, and to the contract of purchase and sale.

It shall not be an objection to bringing real property under this article that the estate or interest of the petitioner is subject to any outstanding lesser estate, mortgage, trust, charge, or other lien or right. But any such lesser estate, mortgage, trust, charge, or other lien or right shall be duly noted on the certificate of title when issued.

EXHIBIT C-2

NEW JERSEY STATUTES – TITLE 46 - PROPERTY

46:16-2. All instruments affecting title to real estate

All instruments of every kind in anywise affecting the title to any real estate situate in this state, or any interest therein, or containing any agreement in relation thereto, or granting any right or interest therein, may be acknowledged or proved and then recorded in the office of the county recording officer of the county wherein the real estate is situate.

EXHIBIT C-3

FLORIDA REAL AND PERSONAL PROPERTY LAW

Chapter 695 – Record of Conveyances of Real Estate

695.01 Conveyances to be recorded.--

(1) No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law; nor shall any such instrument made or executed by virtue of any power of attorney be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice unless the power of attorney be recorded before the accruing of the right of such creditor or subsequent purchaser.

EXHIBIT D
EXAMPLE OF RECORDED RESTRICTION
(NON-U.S.)

RESTRICTION

ORDER OF THE REGISTRAR OF LANDS FOR THE _____

<i>Title Number</i>	<i>Section</i>	<i>Island</i>
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WHEREAS:

- A. Owner and Manager are parties to an agreement dated _____ (“the HMA”) whereby it has been agreed, among other things, that Manager may occupy and manage the Hotel Land.
- B. Under the HMA, Manager has various rights, powers and benefits in relation to the Hotel Land (defined therein as the “Premises”) which the parties are agreed give Manager interests in the Hotel Land.
- C. Owner, Manager and Lender are parties to an agreement dated _____ (“the Non-Disturbance Agreement”), whereby it has been agreed, among other things, that, except in certain circumstances, a sale of any part of the Hotel Land by Lender or a receiver appointed by Lender shall not affect Manager’s rights under the HMA.
- D. Owner and Manager are agreed that Manager’s interests in the Hotel Land are to be protected by way of a restriction entered in the proprietorship section of each of the registers now or hereafter pertaining to the Hotel Land.

IT IS HEREBY ORDERED as follows:

- 1. No disposition of any part of the Hotel Land shall be made which is inconsistent with any of Manager’s rights under the Non-Disturbance Agreement, except with Manager’s prior written consent. The Registrar of Lands may rely conclusively on the certification of Lender (or its successors in title or assigns in relation to the Non-Disturbance Agreement) as to whether or not any particular disposition is inconsistent with any of Manager’s rights under the Non-Disturbance Agreement.
- 2. No disposition of the any part of the Hotel Land (other than by a receiver acting as agent for the registered proprietor in relation to which a certification has been issued by Lender pursuant to paragraph 1 above) shall be made which is inconsistent with

any of Manager's rights under the HMA, except with Manager's prior written consent. The Registrar of Lands may rely conclusively on the certification of Manager (or its successors in title or assigns in relation to the HMA) as to whether or not any particular disposition is inconsistent with any of Manager's rights under the HMA.

3. The restriction referred to in paragraph 1 shall endure until the earlier of:
 - (a) termination or discharge of the Non-Disturbance Agreement; and
 - (b) written agreement by Manager and Lender.
4. The restriction referred to in paragraph 2 shall endure until the earlier of:
 - (a) termination or discharge of the HMA;
 - (b) written agreement by Manager and the registered proprietor of the Hotel Land; and
 - (c) sale of the Hotel Land by a receiver acting as agent for the registered proprietor of the Hotel Land, if the receiver has sold the Hotel Land without assigning the HMA to the purchaser, following the certification by Lender referred to in paragraph 1 above; and for purposes of determining whether the Hotel Land has been sold by a receiver acting as agent for the registered proprietor of the Hotel Land and such sale was made without assigning the HMA to the purchaser, the Registrar of Lands may rely conclusively on the certification by the receiver to that effect.
5. As to whether the Non-Disturbance Agreement has been terminated or discharged, the Registrar of Lands may rely conclusively on a declaration to that effect by a court of competent jurisdiction in _____.
6. As to whether the HMA has been terminated or discharged, the Registrar of Lands may rely conclusively on—
 - (a) a declaration to that effect by a court of competent jurisdiction in _____, or
 - (b) a certificate in the form annexed hereto as Appendix A executed by Owner under seal and accompanied by evidence of delivery to Manager at least 30 days beforehand, BUT THE REGISTRAR SHALL NOT VACATE THE RESTRICTION if within 21 days after giving notice of the certificate to Manager the Registrar receives an objection to the vacating of the Restriction in the form annexed hereto as Appendix B signed on behalf of Manager.
7. The foregoing provisions regarding the release or termination of the restrictions contained herein are supplemental and without prejudice to: (a) any other rights provided under the laws of the _____, including Section _____ of the _____ Ordinance; or (b) any rights provided under the HMA or the Non-Disturbance Agreement as to resolution of disputes thereunder.

DATED this day of

REGISTRAR OF LANDS

THE FOLLOWING CONSENT TO A RESTRICTION IN THE ABOVE FORM:

OWNER

by:

MANAGER

by:

LENDER

by:

NOTES:

1. Robert E. Woolley et al. v. Embassy Suites, Inc. et al., 227 Cal. App. 3rd 1520, 278 Cal. Rptr. 719 (Cal. Appt. First Dist., 1991); and Pacific Landmark Hotel, Ltd. V. Marriott Hotels, Inc. et al., 19 Cal. Appt. 4th 619, 23 Cal. Rptr. 2nd 555 (Cal. Appt. Fourth Dist., 1993)
2. Government Guarantee Fund of the Republic of Finland v. Hyatt Corporation, 95 F 3rd 291 (Third Circuit, 1996)
3. Special Problems in the Development, Financing and Operation of Mixed-Use Projects – ABA Section on Real Property, Probate and Trust Law - Program Chair: James A. Rosenstein - American Bar Association Annual Meeting, Atlanta, Georgia - Tuesday, August 13, 1991.

ABOUT THE AUTHOR:



Albert J. Pucciarelli is admitted to practice law in both New York and New Jersey. His practice is concentrated in the areas of hotel and resort development and operations, general corporate law, real estate law, and aviation law. From 1988 through 1998, he was Executive Vice President and General Counsel of Inter-Continental Hotels & Resorts with over 200 hotels in 70 countries. Prior to joining Inter-Continental, Mr. Pucciarelli served as Vice President and Counsel to Grand Metropolitan (U.S.) and its publicly owned (NYSE) predecessor, Liggett Group Inc., and was an Associate Attorney at the New York law firm of Webster & Sheffield.

He has served as Chair of the Hotels, Restaurants and Tourism Committee of the Association of the Bar of the City of New York (2001-2004) and as Chair of the Aeronautics Law Committee of the Association of the Bar of the City of New York (1998-2001). In 2003-2004, he served as a member of the Hospitality Law Council of the Conrad N. Hilton College of Hotel & Restaurant Management, University of Houston. He is a member of the Hotel Industry Liaison Committee of the ABA Committee on Hotels, Resorts and Tourism.

Mr. Pucciarelli has taught International Business Law as an adjunct professor at the Fordham University Graduate School of Business, and was member of that school's Advisory Board (1996-2004).

Mr. Pucciarelli speaks fluent Russian, is an instrument-rated commercial pilot and aircraft owner, and a member of the Ridgewood, New Jersey, Planning Board and the Board of the Ridgewood Public Library Foundation. Until 1998, he was Vice Chair of the Ridgewood, New Jersey, Zoning Board of Adjustment on which he served for ten years.

He earned his B.A., summa cum laude and Phi Beta Kappa, and his M.A. in Russian Studies from Fordham University and his J.D. from Fordham Law School.

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He is co-author of "Hotel Mixed-Use Development Projects" which was published in connection with the 2004 Hospitality Law Conference, University of Houston.